

Supreme Court, U. S.
FILED
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MICHAEL GODAK, JR., CLERK

**IN THE
SUPREME COURT OF THE
UNITED STATES**

1977-78 TERM

No. 78-1319

STATE OF SOUTH DAKOTA,

Petitioner

vs.

**Brock Adams, United States Secretary of
Transportation, William M. Cox, Federal
Highway Administrator; Arthur Johnson,
Division Highway Administrator, and the
United States of America,**

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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I
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Petitioner, the State of South Dakota respectfully prays that a Writ of Certiorari be granted to review the Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit which Opinion was filed and judgment entered on November 29, 1978.

OPINIONS BELOW

The Opinion of the District Court was filed on January 17, 1978, and is not reported, Attached is a copy thereof in Appendix A.

The Opinion of the Court of Appeals for the Eighth Circuit was rendered November 29, 1978, and is reported at 587 F2d 915 (1978). Attached is a copy thereof in Appendix B.

GROUND ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on November 29, 1978. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit erred in interpreting 23 U.S.C. §131 and 23 C.F.R. §1.36 to allow a reservation of apportionment of Federal Highway Funds and retroactive application of a penalty to apportionments of Federal Aid Highway Funds to South Dakota which had been previously apportioned or were statutorily required to have been apportioned at the time of entry of the Secretary's Order pursuant to 23 U.S.C. §131(b) and (1)?

STATUTES AND REGULATIONS INVOLVED

The instant case involves the following statutes and regulation which are set out verbatim in Appendix C:

- 23 U.S.C. §101(b)(c)
- 23 U.S.C. §104(a)(b)(c)(f)(l)
- 23 U.S.C. §105(a)
- 23 U.S.C. §118(a)
- 23 U.S.C. §131(b)(l)
- 23 C.F.R. §1.36(1974).

STATEMENT OF THE CASE

This action was initiated in United States District Court for the District of South Dakota for preliminary and permanent injunctive relief from a reservation of Federal Aid Highway Funds prior to a determination and final order pursuant to 23 U.S.C. §131(1). A Declaratory Judgment was also sought declaring that the Defendants did not have authority to withhold or reserve Federal Aid Highway Funds which were to have been apportioned prior to a determination and final order pursuant to 23 U.S.C. §131(1).

A. Jurisdiction of Court of First Instance

Jurisdiction of the District Court was invoked under 28 U.S.C. §1331(a) as an action against an Agency, Office or Employee of the United States, under 28 U.S.C. §1361 as an action to compel an officer to do his duty in a proper manner, and under 28 U.S.C. §2201 et seq. for a Declaratory Judgment. The action also involves judicial review of an agency's action pursuant to 5 U.S.C. §701 et seq.

B. Facts

On July 1, 1977 William M. Cox, Federal Highway Administrator sent to South Dakota the certificates of its apportionment of Federal Aid Highway Funds authorized by Congress in the following categories in the following dollar amounts:

Consolidated Primary FY 1978	Rural Secondary FY 1978	Urban System FY 1978	Metropolitan Planning FY 1978	Interstate Resurfacing FY 1979
12,810,772	5,580,984	3,890,450	146,014	2,622,820

The Administer indicated his opinion that South Dakota and other states named

who may be the subject of a determination to invoke the reduction provided in 23 USC 131 for not effectively controlling outdoor advertising along Interstate and Federal-aid primary highways in accordance with 23 USC 131 may after appropriate determination, have amounts apportioned hereunder to such states reduced

by 10 per centum upon the issuance of a final written determination by the Secretary issued pursuant to 23 USC 131 (1). (Plaintiff's Exhibit I).

Brock Adams, Secretary of Transportation, by letter on July 11, 1977 notified South Dakota of its right to a hearing and appeal to District Court under 23 U.S.C. 131 (1). In addition to the notification the letter stated:

I have concluded that South Dakota is not providing for the effective control of outdoor advertising. Pursuant to the provisions fo 23 USC 131 (b), 10 percent of your next Federal-aid highway apportionment will be resrved. (Plaintiff's Exhibit I).

On September 27, 1977, prior to any hearing or final determination and order pursuant to 23 U.S.C. 131 (1), William Cox, Federal Highway Administrator, as indicated below, amended his earlier certificates of apportionment to South Dakota of total sums authorized by Congress in the following categories.

Consolidated Primary FY 1978	Rural Secondary FY 1978	Urban System Fy 1978	Metropolitan Planning FY 1978	Interstate Resurfacing FY 1979
11,529,695	5,022,886	3,501,405	131,413	2,360,538

(Plaintiff's Exhibit I).

On September 30, 1977 William Cox, Federal Highway Administrator, certified South Dakota's apportionment of the total sum for Interstate construction fiscal year 1979 to be \$14,224,458. Mr. Cox admits in his transmittal memo that South Dakota's actual statutory apportionment was reduced by ten percent due to the Secretary's determination that ten percent of such apportionment was reserved and may be permanently withheld. (Plaintiff's Exhibit I).

By stipulation at the hearing there is no dispute concerning the fact that South Dakota's apportionment of Federal-aid in the above categories was reduced by ten percent. (Transcript 9-12). Also by admission at the hearing there is not dispute between the parties as to the fact that no Order of the Secretary of Transportation or final determination under 23 U.S.C. §131 (b) and (1) had been made or issued prior to October 1, 1977. (Transcript p. 21).

South Dakota, by letter dated October 20, 1977, objected to the ten pcent reduction and demanded that the Secretary properly perform his statutory duty and release the entire apportionment. (Plaintiff's Exhibit I). By answering letter, on November 11, 1977, Karl S. Bowers, Deputy Administrator, refused to alter the reduced apportionments. (Plaintiff's Exhibit I). On December 13, 14 and 15, 1977 a hearing pursuant to 23 U.S.C. 131 (b) and (l) was held before the Honorable Paul N. Pfeiffer, Administrative Law Judge. (Plaintiff's Exhibit I).

The dollar amount of the ten percent reductions on the certificate of apportionment is also not in question.

(Transcript p.9) and is as follows:

Consolidated Primary FY 1978	Rural Secondary FY 1978	Urban System FY 1978	Metropolitan Planning FY 1978	Interstate Resurfacing FY 1979
1,281,077	558,098	389,045	14,601	262,282

Interstate
Construction
FY 1979

1,580,495 (Plaintiff's Exhibit 2).

REASONS FOR GRANTING CERTIORARI

A. The question is an important question of Federal law which has not been but should be settled by this Court.

The actions complained of and the relief sought below concern the imposition of a penalty against the State of South Dakota in the amount of 10% of its lawful apportionment of Federal Aid Highway Funds. More precisely, the issue involves the construction of the Federal-Aid Highway Act as it relates to defining the delegated authority of the United States Secretary of Transportation (hereinafter Secretary).

The importance of the Federal question involved is readily ascertainable from the provisions of the Act. Congress, recognizing the inadequacy of highways to meet the "needs of local and interstate commerce, for the national and civil defense", declared it to be "in the national interest

to accelerate the construction of the Federal-Aid Highway systems". 23 U.S.C. §101(b)(1976). The Secretary was required by law to apportion among the states the funds for the fiscal year 1978 primary system, rural secondary system, urban system and metropolitan planning funds and the fiscal year 1979 interstate funds on October 1, 1977. 23 U.S.C. §104. The Secretary was likewise required on October 1, 1977 to certify to each of the state highway departments the sum apportioned. 23 U.S.C. §104(c). The importance of the apportionment and corresponding certification is manifest based upon the following statutory mandate.

On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior Acts, such sums shall be available for expenditure under the provisions of this title. 23 U.S.C. §118(a).

The material fact of the Secretary's actions are not in dispute. The Secretary penalized South Dakota by reducing its certified apportionment of Federal-Aid Highway Funds under the statutory formula by ten per centum or more than four million dollars.

The issue, thus, is important to the administration of the Federal-Aid Highway Act. It requires a determination of whether Congress delegated the Secretary power to impose a penalty on apportionments which were required by the statute to have been made prior to the Secretary's determination upon notice and hearing pursuant to 23 U.S.C. §131 (b), (1), that funds should be withheld from a state because the state has not made provision for effective control of the erection and maintenance of advertising signs, displays and devises. It also involves a determination of whether the Secretary has been delegated power to withhold Federal-Aid Highway Funds from apportionment among the states when at the time of withholding he has made no final determination, upon notice and hearing, pursuant to 23 U.S.C. §131(b), (1).

It is the position of the State of South Dakota that Congress has set out a specific procedure for the imposition of a penalty against the states and that any penalty imposed without compliance with the procedure is not authorized by Congress and thus beyond the Secretary's authority and power. Likewise, it is the State's position that the statute creates a penalty only upon future apportionments.

The Act does contain provision under 23 U.S.C. §131 for withholding ten percent of a state's apportionment. However, such a withholding is conditioned upon the Secretary's **determination** that a state has not made provision for effective control of the erection and maintenance of certain advertising signs, displays and devices. 23 U.S.C. §131(b)(1975). Effective control is defined or explained in 23 U.S.C. §131(c) and is not in question in this lawsuit. Neither, is the compliance or non-compliance of the state. The issues herein involve the existence or nonexistence of the condition precedent to a lawful ten percent withholding for non-compliance. The condition precedent, the Secretary's determination, is explained by 23 U.S.C. §131(l) which reads as follows:

Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States

district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254 [28 U.S.C.S. §1254]. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be. 23 U.S.C. §131(l).

Three key terms are used in the above statute which clarify the condition precedent. There is a proposed determination, a final determination, and an order setting forth the final determination. The "proposed determination" with the reasons therefore must be sent to the state which then has a right to a hearing. A "final determination" is made after the state's hearing. Finally, the "Order Setting Forth The Final Determination" is subject to review in the District Court with appeal to the Circuit Court of Appeals and to the Supreme Court upon certiorari or certification.

The issue thus is whether the Secretary had authority to withhold ten percent of a state's apportionment when an Order setting forth the final determination of the Secretary did not exist and had not been entered.

It is certainly in the public interest to have administrative

agencies operate within the authority granted them by Congress. Thus certiorari should be granted to review this important question in administration of the Federal-Aid Highway Act.

B. The decision below is in conflict with the decisions of this Court.

The decision of the Court of Appeals in this case is in conflict with **Civil Aeronautics Board v. Delta Airlines, Inc.**, 367 U.S. 316, 6 L.Ed2d 869, 81 S.Ct. 1611 (1961), on the question of whether a procedure for agency action set forth by Congress is a prerequisite of the authority and power of an agency to act. The decision is in conflict with **United States v. Seatrain Lines**, 329 U.S. 424, 91 L.Ed. 396 (1947) on the question of whether an administrative agency's power and authority to act under statutorily specified conditions are limited to cases where said conditions exist. The decision is also in conflict with **Securities and Exchange Commission v. Sloan**, —U.S.—, 56 L.Ed. 2d 148, 98 S.Ct.—(1978), on the question of whether the power of an administrative agency is circumscribed by the authority granted by the empowering act.

In **Delta Airlines**, supra, the Civil Aeronautics Board was held to lack power to modify a certificate of public convenience and necessity without notice or hearing, after that certificate had become effective because Congress had statutorily set forth a procedure for alteration, amendment, or modification requiring prior notice and hearing and the statutory procedure was not followed. The instant case involves the imposition of a penalty against the State of South Dakota through withholding approximately four million dollars of its October 1977 apportionment of Federal Aid Highway Funds when Congress statutorily set a procedure for such a penalty against apportionments only after a final determination and Order of the Secretary of Transportation after notice and hearing.

Since the statutory procedure was not followed and the penalty was applied to apportionments, which were required

to have been made prior to the final determination and Order of the Secretary, the imposition of the penalty was beyond the statutory authority of the Secretary and beyond his delegated power.

CONCLUSION

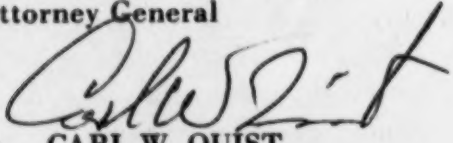
For the reasons stated, it is respectfully submitted that certiorari should be granted, and that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

STATE OF SOUTH DAKOTA:

MARK V. MEIERHENRY

Attorney General

BY: 
CARL W. QUIST
Assistant Attorney General
Attorneys for Petitioner

APPENDIX A

United States District Court
District of South Dakota
January 17, 1978
Andrew M. Bogue
U.S. District Judge
Rapid City, South Dakota 57701

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Re: State of South Dakota vs. Brock Adams, United States Secretary of Transportation, William M. Cox, Federal Highway Administrator; Arthur Johnson, Division Highway Administrator and the United States of America,
CIV77-3038

Gentlemen:

MEMORANDUM OPINION

On July 1, 1977, William M. Cox, Federal Highway Administrator, gave South Dakota officials advance notice of the apportionment of certain Federal-aid Highway Funds which had been authorized for fiscal years 1978 and 1979.¹ In the certificate of apportionment, which the Secretary of Transportation is required by law to submit to the Secretary of the Treasury, Mr. Cox stated:

¹The apportionment became effective October 1, 1977, i.e. the first day of the government's new fiscal year.

[T]he States of Alabama, Massachusetts, New York, Oklahoma and South Dakota who may be the subject of a determination to invoke the reduction provided in 23 U.S.C. §131 for not effectively controlling outdoor advertising along Interstate and Federal-aid primary highways in accordance with 23 U.S.C. §131 may, after appropriate determination, have amounts apportioned hereunder to such States reduced by 10 per centum upon the issuance of a final written determination by the Secretary issued pursuant to 23 U.S.C. §131 (l). (Emphasis ours.)

On July 11, 1977, Brock Adams, Secretary of Transportation, informed Governor Richard F. Kneip that ten percent of the state's next Federal-aid Highway Apportionment would be reserved pursuant to the provisions of 23 U.S.C. §131(b). Subsequent amended apportionments signed by Mr. Cox reflect that ten percent of South Dakota's highway fund apportionment has been reserved because of the state's alleged failure to effectively control outdoor advertising.

This reservation precipitated the present litigation. Everyone interested in this litigation must be careful to understand the limited nature of the question now being considered and the proceedings that led up to this.

The reservation of ten percent of South Dakota's apportionment did not result from a final decision by the Secretary of Transportation that South Dakota had failed to comply with federal law with respect to highway beautification. Rather, the reservation was a tentative determination; in effect, a notice that a final decision on withholding federal funds was under consideration. The State had a statutory right to a hearing on the issue of the State's compliance with federal law. A hearing was requested, and on December 13, 14 and 15, 1977, a hearing was held in Pierre, South Dakota before Administrative Law Judge Paul Pfeiffer. As of January 17, 1978, the Administrative Law Judge has not yet rendered his decision on the matters raised in that hearing. According to counsel, the issues are still being briefed.

On December 22, 1977, the State of South Dakota filed two lawsuits in federal court. In the case presently under consideration (CIV77-3038) the State challenged the authority of the federal defendants insofar as they have reserved ten percent of South Dakota's apportionment prior to the Secretary's final decision on the issue of South Dakota's compliance with the Highway Beautification Act. In the other lawsuit (CIV77-3039) the State has made several challenges to the constitutionality of the Highway Beautification Act and actions taken by federal officials pursuant to that act. It is of the utmost importance for all persons concerned with this litigation to recognize that the issues under consideration in this Memorandum Opinion relate only to the power of federal officials to reserve ten percent of South Dakota's apportionment of certain highway funds in advance of a final decision by the Secretary of Transportation. The case now being discussed has nothing whatever to do with the merits of the dispute between South Dakota and the federal officials as to the constitutionality of the Highway Beautification Act, or actions taken pursuant to that act, and nothing in this opinion will resolve or even remotely deal with the issue of South Dakota's compliance or noncompliance with standards set by the federal government for highway beautification. What is at issue in this case is, solely and simply, whether the federal defendants have the power to carry out the "reservation" action which they have undertaken. This issue can only be resolved by statutory construction.

I.

The statutes upon which the federal defendants rely for their powers in this instance are 23 U.S.C. §131(b) and 23 U.S.C. §131(l). Subsection (b) states in relevant part:

. . . Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provisions for effective

control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices . . . shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other states....

Subsection (l) states in relevant part:

Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, . . . the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefore, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal.

Subsection (b) tells us what the federal officials can do to penalize a State for failure to comply with federal standards. Subsection (l) tells us how the penalty can be imposed. The rudiments of due process (notice and hearing) are specifically required, and judicial review is explicitly allowed. The state admits that the federal officials have given notice and have given an opportunity to be heard. In short, they are following the statute. The time for appeal has not yet arrived. One must inquire, therefore, precisely why this controversy arose.

II.

The essence of this controversy is time. The controversy does not concern so much what the federal officials can do or even how they do it, but rather **when** a certain action can be done.

The State's complaint is essentially that the actions of the Secretary of Transportation and his subordinates have outrun their powers as the sequence of events has unfolded, i.e. that they have acted more quickly than the statute allows. At oral argument counsel for the State suggested that the situation is akin to the sentencing of an alleged criminal before a trial. As a person accused of a crime is presumed to be innocent until proven guilty, likewise a State should be presumed to be entitled to its full apportionment until federal officials prove that the State should be penalized. Thus, the State's case rests upon the theory that the federal official's actions have been premature. The theory can be derived with some logic from a literal reading of the statute.

Federal defendants argue, of course, that they are doing only what the statute allows and, indeed, what the purpose of the act requires. According to their theory, they are not yet "withholding" any part of the State's apportionment; they are "reserving" it until a final decision of the Secretary of Transportation is forthcoming.

Under this line of reasoning, a "withholding" is the final act by which ten percent of a State's apportionment is cut off from the State's use and made available for redistribution to other States. A "reservation" is the less severe act of keeping a part of a State's apportionment while the question of whether or not a withholding is lawful, is decided. The federal officials' argument turns not so much on the language of the statute itself as upon an understanding of the entire plan of highway funding.

III.

While the argument of the State has an internal logic, this Court believes that the argument of the federal defendants makes more sense.

As we understand the rather complex process of extending federal aid to states for highways, it works like this.² First,

²This account of highway funding is, we understand, a simplification of what in reality is a long, complex process.

appropriations are made by Congress. Second, the Federal Highway Administrator apportions funds for the states. Third, the States (with federal approval) obligate their apportioned funds. Fourth, work is done on highways. Fifth, someone actually gets paid.

If one were to adopt the viewpoint of the State, it would be necessary to accept the proposition that a state could always obligate everything which was apportioned unless the Secretary had made a final decision to withhold part of the State's apportionment. If funds were obligated, work could be done. If work could be done, someone would have a bona fide claim for money. But if the final decision of the Secretary were adverse to the State, then there would be no money forthcoming for the amount equal to ten percent of the State's apportionment. The State would have spent money it was never entitled to receive.

The way around this dilemma is to assert (as the State has done) that the penalty cannot apply to apportionments made at the time of a reservation, but only can apply to "future apportionments." The problem with this is that "future apportionments" are hypothetical apportionments. Nobody has any certain way of knowing how large they will be or whether there will ever, in fact, be future apportionments. The power to withhold a part of future apportionments is at best the power to promise to someday impose a penalty. We think the power to withhold is the power to do just that--to withhold a dollar amount of an apportionment from a state's power to obligate it.

IV.

Our viewpoint is confirmed by carefully reading the sentence in subsection (l) which provides that a Secretary's final order (an order to withhold ten percent) shall be stayed pending a final judgment on appeal. If a final order pertained only to future apportionments, a stay would make no sense. Who would be concerned about apportionments not yet in existence? There would be little reason for

apprehension on the part of state officials and no reason for a mandatory stay of the Secretary's order if his power was statutorily limited to redistributing a not-yet-existent apportionment.

The mandatory stay prevents the redistribution of apportionments (sums certain) which have been reserved pending an administrative hearing on the propriety of a withholding. In this case, a stay would prevent the redistribution of funds apportioned for South Dakota if, after an adverse decision by the Administrative Law Judge, the State decided to take an appeal on the merits to a federal district court. To conclude otherwise, we would have to assume that Congress deemed a stay pending appeal to be vitally important even though the injury to a state without a stay would be hypothetical because there would be no existing apportionment which the Secretary could redistribute.

V.

In undertaking this exercise in statutory construction, we have obviously not had the benefit of another court's opinion. As far as we can tell, this is a case of first impression. We have tried to construe the statute in light of some famous words from Thomas Jefferson:

Laws are made for men of ordinary understanding, and should therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties, which may make anything mean everything or nothing at pleasure. Thomas Jefferson, Letter to William Johnson, June 12, 1823.

We stress again that this decision has nothing to do with the constitutionality of the Highway Beautification Act. This decision is not a comment upon South Dakota's alleged compliance or noncompliance with the Highway Beautification Act. The latter issue is now under consideration by an Administrative law Judge. The former is raised in another case pending in this Court.

Our decision for the federal defendants and against the State does not mean that this Court adopts in whole the definitions of terms and distinctions used by the attorneys for the government. We have, however, accepted the general line of their reasoning as the foregoing paragraphs indicate. An order denying the declaratory and injunctive relief sought by the State will be entered forthwith.

The parties have agreed to consolidate the hearing on the State's motion for a preliminary injunction with the hearing on the merits (the issues being the same), and this Court having herein decided the issue on the merits by an exercise in statutory construction, it is obvious that there is no need to consider testimony on irreparable harm, etc. This would involve the Court in a meaningless consideration of the criteria for preliminary injunctive relief when the final relief had already been denied. Moreover, in resolving the question herein presented, the Court was faced only with a matter of law. Therefore, no fact-finding pursuant to Rule 52 of the Federal Rules of Civil Procedure will be necessary. The foregoing shall constitute the Court's conclusions of law.

BY THE COURT:

/S/ Andrew W. Bogue

ANDREW W. BOGUE, JUDGE
UNITED STATES DISTRICT COURT

APENDIX B

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 78-1199

State of South Dakota,

Appellant,

v.

Brock Adams, U.S. Secretary
of Transportation; William
M. Cox, Federal Highway
Administrator; Arthur
Johnson, Division Highway
Administrator and the
United States of America,

Appellees.

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* Appeal from the United
* States District Court
* for the District of
* South Dakota.
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*
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Submitted: September 15, 1978

Filed: November 29, 1978

Before LAY and BRIGHT, Circuit Judges, and
HARPER, Senior District Judge.*

BRIGHT, Circuit Judge.

*ROY W. HARPER, United States Senior District Judge, Eastern District of Missouri, sitting by designation.

On July 11, 1977, the Secretary of Transportation, Brock Adams (Secretary), notified the State of South Dakota that he had made a preliminary determination that South Dakota had failed to exercise "effective control" of outdoor advertising as required by Title I of the Highway Beautification Act, 23 U.S.C. §131 (1976), and that as a result the Secretary would temporarily reserve ten percent of the State's next federal-aid highway apportionment pending his final determination of the "effective control" question. In an effort to prevent such action prior to the Secretary's final determination, the State brought this suit seeking injunctive and declaratory relief against the Secretary. The district court denied the requested relief, and this timely appeal followed.

I.

The manner in which the federal government provides highway funding to the states is governed by the Federal-Aid Highway Act, 23 U.S.C. §101 et seq. (1976). The funding proceeds through several stages. Ninety days prior to the start of each fiscal year the Secretary advises each state of the amount of funds that will be apportioned to it that year. 23 U.S.C. §104(e). On October 1 of each fiscal year the Secretary, using formulas set forth in 23 U.S.C. §104(b), apportions among the states the sums authorized to be appropriated. Once apportioned, the funds are available for obligation by the states. 23 U.S.C. §118(a).¹ Funds are obligated when the Secretary approves a highway project submitted by a state. 23 U.S.C. §106(a). After work is completed on a project, the

¹Interstate funds, which are those used to construct or resurface the 42,500 miles of roads comprising the Interstate System, 23 U.S.C. §103(e), are apportioned on October 1 of the year preceding the fiscal year for which authorized and remain available for obligation for two years after the fiscal year for which authorized. All other highway funds are apportioned on October 1 of the fiscal year for which authorized and remain available for obligation for three years after the fiscal year for which authorized. 23 U.S.C. §§104(e), 118(b). Any amounts unexpended during those four-year periods lapse. Lapsed amounts that had been authorized for the construction of the Interstate System are immediately reapportioned among the other states in accordance with the provisions of 23 U.S.C. §104(b) (5) (A). 23 U.S.C. §118(b).

state pays the costs and submits vouchers to the Secretary, who pursuant to congressional appropriations acts reimburses the state in the amount of the federal share. 23 U.S.C. §§120, 121.

In 1965, Congress enacted the Highway Beautification Act, 23 U.S.C. §§131, 136, 319, which placed strict controls on outdoor advertising adjacent to the Interstate and primary highway systems.² Where the Secretary determines that a state has failed to provide for "effective control" of outdoor advertising,³ the state's apportionment of federal-aid highway funds is reduced by ten percent in accordance with 23 U.S.C. §131(b).⁴ The procedural rules concerning such a

²There are four federal-aid highway systems: primary, urban, secondary, and Interstate. 23 U.S.C. §103. The primary system is "an adequate system of connected main roads important to interstate, statewide, and regional travel, consisting of rural arterial routes and their extensions into or through urban areas." 23 U.S.C. §103(b)(2). The Interstate System "connect[s] by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers * * *." 23 U.S.C. §103(e)(1).

³"Effective control" means that, with a few exceptions, only directional and official signs are permitted within view of the highways. 23 U.S.C. §131(e). A major exception concerns commercial and industrial areas, which may contain outdoor advertising so long as the Secretary and the states agree on the size, lighting, and spacing of the advertising, consistent with customary use. 23 U.S.C. §131(d).

⁴Section 131(b) reads as follows:

(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate system and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the state legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such state shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

reduction are set forth in 23 U.S.C. §131(l).⁵ Those rules require that, at least sixty days before making a final determination to impose the ten percent penalty, the Secretary must give the state written notice of his proposed determination, a statement of reasons for it, and an opportunity for a hearing. Following the hearing, if one is held, the Secretary is to issue a written order setting forth his final determination. Within forty-five days the state may appeal an adverse order to a United States District Court. The Secretary may not reapportion to other states the amount withheld from the state's apportionment pending final judgment on the appeal. However, the Secretary's order is effective to reduce the state's apportionment pending judicial review.

II.

In 1966, in response to the Highway Beautification Act, South Dakota enacted the Highway Beautification and regulation of Advertising Act, S.D. Codified Laws Ann. §31-29. In 1973, as a result of a determination by the Secretary that South Dakota had not provided for effective control of outdoor advertising, the State amended its statute to bring it into compliance with the

⁵ The relevant portion of §131(l) reads as follows:

(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, * * * the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. * * * The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section * * * the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

federal law.⁶ In September 1976, however, the Supreme Court of South Dakota invalidated the conforming statute in *Hogen v. South Dakota State Board of Transportation*, 245 N.W. 2d 493 (S.D. 1976), on the ground that it unconstitutionally delegated legislative authority to the State Board of Transportation.

In the 1977 South Dakota legislative session, the State considered corrective legislation. The Secretary advised the State of his opinions as to the adequacy of various legislative proposals and warned of the consequences of noncompliance. Nevertheless, on April 1, 1977, the State enacted a statute that the Secretary earlier had indicated was in conflict with the federal law.

On July 11, 1977, the Secretary notified the State of his preliminary determination that it was not providing for effective control of outdoor advertising. He also advised the State that ten percent of its next federal-aid highway apportionment would be reserved pending his final determination of the effective control question.

The reservation of the apportionment of federal highway funds took effect on October 1, 1977. Two months prior to that, on August 5, 1977, the State requested an evidentiary hearing. The hearing was not

⁶As we learn from the opinion in *South Dakota v. Volpe*, 353 F. Supp. 335 (D. S.D. 1973), this earlier controversy arose on May 18, 1971, when the Secretary informed South Dakota of his proposed determination to withhold 10 percent of the State's fiscal 1973 apportionment because of the State's failure to provide for effective control of outdoor advertising. Following an evidentiary hearing, the Secretary announced on March 1, 1972, that the 10 percent penalty would be imposed. The State then filed suit to regain the withheld funds, but the district court upheld the Secretary's action. *Id.* As a result, the State amended its statute in 1973 to comply with federal standards. See *Hogen v. South Dakota State Board of Transportation*, 245 N.W. 2d 493, 495 (S.D. 1976). The Secretary's brief in the present case recites that "[a]s of the summer of 1976, South Dakota was in substantial compliance with minimum Federal standards."

held until December 13-15, 1977.⁷ On December 22, 1977, the State instituted the present lawsuit. The district court entered judgment in favor of the Secretary on January 17, 1978, and this appeal followed. No final determination by the Secretary had been made as of the date of submission of this case to us in September 1978, but as we note *infra* at 11 n.10, the Secretary issued his final administrative determination on November 9, 1978.

III.

The Secretary contends that his interim reservation of ten percent of South Dakota's apportionment of highway funds comes within his broad powers to administer the Federal-Aid Highway Act. Under 23 U.S.C. §315, "the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of [the Act]." Pursuant to this authority, the Secretary promulgated 23 C.F.R. §1.36 (1977), which authorizes the administrator of the Federal Highway Administration to take such action as he deems appropriate to bring a state into compliance with the Act.⁸

⁷At the district court trial an attorney representing South Dakota explained the delay as follows:

A lot of the delay had to do with where the hearing would be held. Governor Kneip had requested that the hearing be held in South Dakota and the Secretary of Transportation apparently took that under advisement and there were various conversations given that. Then it was ultimately decided to hold the hearing in South Dakota and then there was the matter of getting the Administrative Law Judge assigned to the case who was assigned from the Office of Consumer Products Safety and then the other part of the delay was getting a time schedule for the convenience of the parties and Law Judge.

⁸The regulation reads as follows:

If the Administrator [of the Federal Highway Administration] determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator. [Emphasis added.]

The Secretary argues that his action in this case was appropriate because it preserves the status quo until he can make his final determination as to whether South Dakota has provided for effective control of outdoor advertising. Without the interim withholding, the State could obligate monies to which it may not be entitled because of its noncompliance with the Act, and thereby effectively nullify the penalty provisions contained in section 131(b).

The State, on the other hand, stresses that nothing in Title I of the Highway Beautification Act expressly authorizes the Secretary's temporary withholding or reservation of highway funds pending his final determination. In light of the care taken by Congress to specify the manner in which the ten percent sanction is to be applied, its silence with respect to a temporary withholding power is highly significant. Only after a final determination, argues the State, can the Secretary withhold highway funds.

Despite the absence of explicit statutory authority for the Secretary's action, we hold that the Act impliedly allows it. "It has been the law at least since *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 [1819], that the lawful delegation of a power carries with it the authority to do whatever is reasonable and appropriate properly to effectuate the power." *Gallagher's Steak House v. Bowles*, 142 F.2d 530, 534 (2d Cir. 1944). See also 2A Sutherland, *Statutory Construction* §55.04 (4th ed. 1973). We are convinced that the Secretary's interim withholding here is a reasonable and appropriate method of ensuring the efficacy of the ten percent penalty.

Under section 131 (l), the Secretary possesses the power to impose the ten percent penalty in as few as sixty days after he notifies the State of his proposed determination. Consistently with the provisions of the Administrative Procedures Act, the Secretary could have required a hearing thirty days after his notice to the State, and expedited matters to enable him to make a final determination thirty days thereafter, thereby coming within the authorization of

section 131(b) to reach a final determination not less than sixty days after notice to the State. Because here the Secretary notified the State of his proposed determination on July 11, 1977, the Secretary could have made his final determination in advance of the October 1, 1977, apportionment date. He did not do so, but afforded the State an extended period of time to administratively contest the Secretary's preliminary determination of the State's failure to exercise "effective control" of outdoor advertising. In order to retain a right to penalize the State in case it proved unable to persuade him that his proposed determination was incorrect, the Secretary simply set aside ten percent of the State's apportionment pending his final determination.

This procedure carries a less drastic effect than a final withholding decision, which, as we have noted, might have been made prior to October 1, 1977, because the amount temporarily retained still remains available to the State if the Secretary makes a final determination of the "effective control" question favorable to the State. Therefore, without causing undue prejudice to the State, the Secretary's interim withholding properly preserved the status quo pending the outcome of the hearing.

In *State of Nebraska, Department of Roads v. Tiemann*, 510 F.2d 446 (8th Cir. 1975), we were faced with a question concerning the Secretary's implied power to compel compliance with the Federal-Aid Highway Act. There the Federal Highway Administrator determined that the State of Nebraska had not complied with section 109(d) of the Act because it had maintained tourist attraction signs in the interstate right-of-way without the concurrence of the Secretary.⁹ On that basis, the Secretary withheld approval of all primary system highway projects in Nebraska until the signs were removed. Although that action by the Secretary was not expressly authorized by the Act, we upheld it as

⁹Section 109(d) reads as follows:

(d) On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State highway department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

within the Secretary's broad powers to administer the Act.

Similarly, in the present case, the Secretary's conduct is consistent with the enforcement powers Congress conferred upon the Secretary to achieve highway beautification.

Accordingly, we hold that the Secretary's action is not unauthorized and that the district court properly denied the State of South Dakota injunctive and declaratory relief.¹⁰

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

¹⁰Our holding does not indicate approval of the administrative delays that have occurred in this case. In a matter of such public importance, we believe that the Secretary and his designees engaged in the administrative determination should have acted with far more alacrity than has been displayed here. We are now advised that the Secretary, as of November 9, 1978, has made a final determination of the "effective control" issue adverse to South Dakota. That determination is subject to judicial review under §131(l) and is not an issue on this appeal.

APPENDIX C

23 USC §101. Definitions and declaration of policy

(b) It is hereby declared to be in the national interest to accelerate the construction of the Federal-aid highway systems, including the National System of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce, for the national and civil defense.

It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereafter referred to as the "Interstate System," is essential to the national interest and is one of the most important objectives of this Act [this title]. It is the intent of Congress that the Interstate System be completed as nearly as practicable over the period of availability of the thirty-four years' appropriations authorized for the purpose of expediting its construction, reconstruction, or improvement, inclusive of necessary tunnels and bridges, through the fiscal year ending September 30, 1990, under section 108(b) of the Federal-Aid Highway Act of 1956 (70 Stat. 374) [see other provisions note to this section], and that the entire System in all States be brought to simultaneous completion. Insofar as possible in consonance with this objective, existing highways located on an interstate route shall be used to the extent that such use is practicable, suitable, and feasible, it being the intent that local needs, to the extent practicable, suitable, and feasible, shall be given equal consideration with the needs of interstate commerce.

It is further declared that since the Interstate System is now in the final phase of completion it shall be the national policy that increased emphasis be placed on the construction and reconstruction of the other Federal-aid systems in accordance with the first paragraph of this subsection, in

order to bring all of the Federal-aid systems up to standards and to increase the safety of these systems to the maximum extent.

(c) It is the sense of Congress that under existing law no part of any sums authorized to be appropriated for expenditure upon any Federal-aid system which has been apportioned pursuant to the provisions of this title shall be impounded or withheld from obligation, for purposes and projects as provided in this title, by any officer or employee in the executive branch of the Federal Government, except such specific sums as may be determined by the Secretary of the Treasury, after consultation with the Secretary of Transportation, are necessary to be withheld from obligation for specific periods of time to assure that sufficient amounts will be available in the Highway Trust Fund to defray the expenditures which will be required to be made from such fund.

23 USC §103. Federal-aid systems

(a) For the purposes of this title, the four Federal-aid systems, the primary system, the urban system, the secondary system, and the Interstate System are established and continued pursuant to the provisions of this section.

(b)(1) The Federal-aid primary system shall consist of an adequate system of connected main highways, selected or designated by each State through its State highway department, subject to the approval of the Secretary as provided by subsection (e) of this section. This system shall not exceed 7 per centum of the total highway mileage of such State, exclusive of mileage within national forests, Indian, or other Federal reservations and within urban areas, as shown by the records of the State highway department on November 9, 1921. Whenever provision has been made by any State for the completion and maintenance of 90 per centum of its Federal-aid primary system, as originally designated,

said State through its State highway department by and with the approval of the Secretary is authorized to increase the mileage of its Federal-aid primary system by additional mileage equal to not more than 1 per centum of the total mileage of said State as shown by the records on November 9, 1921. Thereafter, it may make like 1 per centum increases in the mileage of its Federal-aid primary system whenever provision has been made for the completion and maintenance of 90 per centum of the entire system, including the additional mileage previously authorized. This system may be located both in rural and urban areas. The mileage limitations in this paragraph shall not apply to the District of Columbia, Hawaii, Alaska, or Puerto Rico.

(2) After June 30, 1976, the Federal-aid primary system shall consist of an adequate system of connected main roads important to interstate, statewide, and regional travel, consisting of rural arterial routes and their extensions into or through urban areas. The Federal-aid primary system shall be designated by each State acting through its State highway department and where appropriate, shall be in accordance with the planning process pursuant to section 134 of this title, subject to the approval of the Secretary as provided by subsection (f) of this section.

(c)(1) The federal-aid secondary system shall be selected by the State highway departments and the appropriate local road officials in cooperation with each other, subject to approval by the Secretary as provided in subsection (e) of this section. In making such selections, farm-to-market roads, rural mail routes, public school bus routes, local rural roads, access roads to airports, county roads, township roads, and roads of the county road class may be included, so long as they are not on the Federal-aid primary system or the Interstate System. This system may be located both in rural and urban areas, but any extension of the system into urban areas shall be subject to the condition that such extension

pass through the urban area or connect with another Federal-aid system within the urban area.

(2) After June 30, 1976, the Federal-aid secondary system shall consist of rural major collector routes. The Federal-aid secondary system shall be designated by each State through its State highway department and appropriate local officials in cooperation with each other, subject to the approval of the Secretary as provided in subsection (f) of this section.

(d)(1) The Federal-aid urban system shall be established in each urbanized area, and in such other urban areas as the State highway department may designate. The system shall be so located as to serve the major centers of activity, and shall include high traffic volume arterial and collector routes, including access roads to airports and other transportation terminals. No route on the Federal-aid urban system shall also be a route on any other Federal-aid system. Each route of the system to the extent feasible shall connect with another route on a Federal-aid system. Routes on the Federal-aid urban system shall be selected by the appropriate local officials so as to serve the goals and objectives of the community, with the concurrence of the State highway departments, and, in urbanized areas, also in accordance with the planning process under section 134 of this title. Designation of the Secretary as provided in subsection (f) of this section. The provisions of chapters 1, 3 and 5 of this title [23 USCS §§101-144, 301-322] that are applicable to Federal-aid primary highways shall apply to the Federal-aid urban system except as determined by the Secretary to be inconsistent with this subsection.

(2) After June 30, 1976, the Federal-aid urban system shall be located in each urbanized area and such other urban areas as the State highway departments may designate and shall consist of arterial routes and collector routes, exclusive of urban extensions of the Federal-aid primary system. The routes on the Federal-aid urban system shall be designated

by appropriate local officials, with the concurrence of the State highway departments, subject to the approval of the Secretary as provided in subsection (f) of this section, and in the case of urbanized areas shall also be in accordance with the planning process required pursuant to the provisions of section 134 of this title.

(e)(1) The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

(2) In addition to the mileage authorized by the first sentence of paragraph (1) of this subsection, there is hereby authorized additional mileage for the Interstate system of five-hundred miles, to be used in making modifications or revisions in the Interstate System as provided in this paragraph. Upon the request of a State highway department the Secretary may withdraw his approval of any route or portion thereof on the Interstate System within that State selected and approved in accordance with this title, if he determines that such route or portion thereof is not essential to completion of a unified and connected Interstate System

(including routes necessary for metropolitan transportation) and will not be constructed as a part of the Interstate System, and if he receives assurances that the State does not intend to construct a toll road in the traffic corridor which would be served by such route or portion thereof. After the Secretary has withdrawn his approval of any such route or portion thereof the mileage of such route or portion thereof and the additional mileage authorized by the first sentence of this paragraph shall be available for the designation of interstate routes or portions thereof as provided in this subsection. The provisions of this title applicable to the Interstate system shall apply to all mileage designated under the third sentence of this paragraph, except that the cost to the United States of the aggregate of all mileage designated under the third sentence of this paragraph shall not exceed the cost to the United States of the aggregate of all mileage approval for which is withdrawn under the second sentence of this paragraph as such cost is included in the 1972 Interstate system cost estimate set forth in House Public Works committee Print Numbered 92-29, as revised in House Report Numbered 92-1443, or if the cost of any such withdrawn route was not included in such 1972 Interstate System cost estimate, the cost of such withdrawn route as set forth in the last Interstate System cost estimate before such 1972 cost estimate which was approved by Congress and which included the cost of such withdrawn route, increased or decreased, as the case may be, as determined by the Secretary, based on changes in construction costs of such route or portion thereof, which, (i) in the case of a withdrawn route the cost of which was not included in the 1972 cost estimate but in an earlier cost estimate, have occurred between such earlier cost estimate and the date of enactment of the Federal-Aid Highway Act of 1976 [May 5, 1976], and (ii) in the case of a withdrawn route the cost of which was included in the 1972 cost estimate, have occurred between the 1972 cost estimate and the date of enactment of the

Federal-Aid Highway Act of 1976 [May 5, 1976], or the date of withdrawal of approval, whichever date is later, and in each case costs shall be based on that design of such route or portion thereof which is the basis of the applicable cost estimate. In considering routes or portions thereof to be added to the Interstate System under the third sentence of this paragraph, the Secretary shall, in consultation with the States and local governments concerned, give preference, along with due regard for interstate highway type needs on a nationwide basis, to (A) routes or portions thereof, and (B) the extension of routes which terminate within municipalities served by a single interstate route, so as to provide traffic service entirely through such municipalities. (3) In addition to the mileage authorized by paragraphs (1) and (2) of this subsection, there is hereby authorized additional mileage of not to exceed 1,500 miles for the designation of routes in the same manner as set forth in paragraph (1), in order to improve the efficiency and service for the Interstate System to better accomplish the purpose for that System.

23 USC §104. Apportionment

(a) Whenever an apportionment is made of the sums authorized to be appropriated for expenditure upon the Federal-aid systems, the Secretary shall deduct a sum, in such amount not to exceed 3-3/4 per centum of all sums so authorized, as the Secretary may deem necessary for administering the provisions of law to be financed from appropriations for the Federal-aid systems and for carrying on the research authorized by subsections (a) and (b) of section 307 of this title. In making such determination the Secretary shall take into account the unexpended balance of any sums deducted for such purposes in prior years. The sum so deducted shall be available for expenditure from the unexpended balance of any appropriation made at any time for expenditure upon the Federal-aid systems until such sum has been expended.

(b) On October 1 of each fiscal year except as provided in paragraphs (4) and (5) of this subsection, the Secretary, after making the deduction authorized by subsection (a) of this section, shall apportion the remainder of the sums authorized to be appropriated for expenditure upon the Federal-aid systems for that fiscal year, among the several States in the following manner:

- (1) For the Federal-aid primary system (including extensions in urban areas and priority primary routes)-Two-thirds according to the following formula: one-third in the ratio which the area of each State bears to the total area of all the States, one-third in the ratio which the population of rural areas of each State bears to the total population of rural areas of all the States as shown by the latest available Federal census, and one-third in the ratio which the mileage of rural delivery routes and intercity mail routes where service is performed by motor vehicles in each State bear to the total mileage of rural delivery and intercity mail routes where service is performed by motor vehicles, as shown by a certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary; and one-third as follows: in the ratio which the population in urban areas in each State bears to the total population in urban areas in all the States as shown by the latest Federal census. No State (other than the District of Columbia) shall receive less than one-half of 1 per centum of each year's apportionment.
- (2) The Federal-aid secondary system:
One-third in the ratio which the area of each State bears to the total area of the States; one-third in the ratio which the population of rural areas of each State bears to the total population of rural areas of all of the States as shown by the latest available Federal census; and one-third in the ratio which the mileage of rural delivery and intercity mail routes where service is performed by motor vehicles, certified as above provided, in each State bears to the total mileage of rural delivery and intercity mail routes

where service is performed by motor vehicles in all the States. No State (other than the District of Columbia) shall receive less than one-half of 1 per centum of each year's apportionment.

(5)(A) Except as provided in subparagraph (B)-For interstate System for the fiscal years 1960 through 1990:

For the fiscal years 1960 through 1966, in the ratio which the estimated cost of completing the interstate system in such state, as determined and approved in the manner provided in this paragraph, bears to the sum of the estimated cost of completing the Interstate System in all the States. For the fiscal years 1967 through 1990, in the ratio which the Federal share of the estimated cost of completing the Interstate System in such State, as determined and approved in the manner provided in this paragraph, bears to the sum of the estimated cost of the Federal share of completing the Interstate System in all the States. Each apportionment herein authorized for the fiscal years 1960 through 1990, inclusive, shall be made on October 1 of the year preceding the fiscal year for which authorized. As soon as the standards provided for in subsection (b) of section 109 of this title have been adopted, the Secretary, in cooperation with the state highway departments, shall make a detailed estimate of the cost of completing the Interstate System as then designated, after taking into account all previous apportionments made under this section, based upon such standards and in accordance with rules and regulations adopted by him and applied uniformly to all the States. The Secretary shall transmit such estimates to the Senate and the House of Representatives within ten days subsequent to January 2, 1958. Upon approval of such estimate by the congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1960, June 30, 1961, and June 30, 1962. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous

apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1961. Upon approval of such estimate by the Congress by concurrent resolution, the Secretary shall use such approved estimate in making apportionments for the fiscal years ending June 30, 1963, June 30, 1964, June 30, 1965, and June 30, 1966. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System, after taking into account all previous apportionments made under this section, in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1965. Upon the approval of such estimate by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1967; June 30, 1968; and June 30, 1969. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1968. Upon the approval by the Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1970, and June 30, 1971. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives on April 20, 1970. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1972, and June 30, 1973. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous

System after taking into account all previous apportionments made under this section, in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1972. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimate in making apportionments for the fiscal years ending June 30, 1974, June 30, 1975, and June 30, 1976. The secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above, and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1975. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimate in making the apportionment for the fiscal year ending September 30, 1977. The Secretary shall make the apportionment for the fiscal year ending September 30, 1977. The Secretary shall make the apportionment for the fiscal year ending September 30 1978; in accordance with section 103 of the Federal-Aid Highway Act of 1976 [23 USCS §101 note]. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above, and transmit the same to the Senate and the House of Representative within ten days subsequent to January 2, 1977. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1979, and September 30, 1980. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten

days subsequent to January 2, 1979. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1981, and September 30, 1982. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate system after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1981. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1983, and September 30, 1984. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1983. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1985, and September 30, 1986. The Secretary shall make a revised estimate of the Cost of completing the then designated Interstate system after taking into account all previous apportionments made under this section in the same manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1985. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1987, and September 30, 1988. The Secretary shall make a revised estimate of the cost of completing the then designated Interstate System after taking into account all previous apportionments made under this section in the same

manner as stated above and transmit the same to the Senate and the House of Representatives within ten days subsequent to January 2, 1987. Upon the approval by Congress, the Secretary shall use the Federal share of such approved estimates in making apportionments for the fiscal years ending September 30, 1989, and September 30, 1990. Whenever the Secretary, pursuant to this subsection, requests and receives estimates of cost from the State highway departments, he shall furnish copies of such estimates at the same time to the Senate and the House of Representatives.

(B) For resurfacing, restoring, and rehabilitating the Interstate System:

In the ratio which the lane miles on the Interstate System which have been in use for more than five years (other than those on toll roads) in each State bears to the total of the lane miles on the Interstate System which have been in use for more than five years (other than those on toll roads) in all States.

(6) For the Federal-aid urban system:

In the ratio which the population in urban areas, or parts thereof, in each State bears to the total population in such urban areas, or parts thereof, in all the States as shown by the latest available Federal census. No State shall receive less than one-half of 1 per centum of each year's apportionment.

(c)(1) subject to subsection (d), the amount apportioned in any fiscal year, commencing with the apportionment of funds authorized to be appropriated under subsection (a) of section 102 of the Federal-Aid Highway Act of 1956 (70 stat. 374) [note to this section], to each State in accordance with paragraph to the apportionment under the other paragraph if such a transfer is requested by the State highway department and is approved by the governor of such State and the Secretary as being in the public interest.

(2) Subject to subsection (d), the amount apportioned in any fiscal year to each State in accordance with paragraph (1) or (6) of subsection (b) of this section may be transferred from the apportionment under one paragraph to the apportionment under the other paragraph if such transfer is requested by the State highway department and is approved

by the Governor of such State and the Secretary as being in the public interest. Funds apportioned in accordance with paragraph (6) of subsection (b) of this section shall not be transferred from their allocation to any urbanized area of two hundred thousand population or more under section 150 of this title, without the approval of the local officials of such urbanized area.

(e) On October 1 of each fiscal year the Secretary shall certify to each of the State highway departments the sums which he has apportioned hereunder (other than under subsection (b)(5) of this section) to each State for such fiscal year, and also the sums which he has deducted for administration and research pursuant to subsection (a) of this section. On October 1 of the year preceding the fiscal year for which authorized, the Secretary shall certify to each of the State highway departments the sums which he has apportioned under subsection (b)(5) of this section to each State for such fiscal year, and also the sums which he has deducted for administration and research pursuant to subsection (a) of this section. To permit the States to develop adequate plans for the utilization of apportioned sums, the Secretary shall advise each State of the amount that will be apportioned each year under this section not later than ninety days before the beginning of the fiscal year for which the sums to be apportioned are authorized, except that in the case of the Interstate system the Secretary shall advise each State ninety days prior to the apportionment of such funds.

(f)(1) On October 1 of each fiscal year, the Secretary, after making the deduction authorized by subsection (a) of this section, shall set aside not to exceed one-half per centum of the remaining funds authorized to be appropriated for expenditure upon the Federal-aid systems, for the purpose of carrying out the requirements of section 134 of this title, except that in the case of funds authorized for apportionment on the Interstate system, the Secretary shall set aside that portion of such funds (subject to the overall limitation of one-half of 1 per centum) on October 1 of the year next preceding the fiscal year for which such funds are authorized for such System.

(2) These funds shall be apportioned to the States in the ratio which the population in urbanized areas or parts

thereof, in each State bears to the total population in such urbanized areas in all the states as shown by the latest available census, except that no State shall receive less than one-half per centum of the amount apportioned.

(3) The funds apportioned to any State under paragraph (2) of this subsection shall be made available by the state to the metropolitan planning organizations designated by the State as being responsible for carrying out the provisions of section 134 of this title. These funds shall be matched in accordance with section 120 of this title unless the Secretary determines that the interests of the Federal-aid highway program would be best served without such matching, except that States receiving the minimum apportionment under paragraph (2) may, in addition, subject to the approval of the Secretary, use the funds apportioned to finance transportation planning outside of urbanized areas.

(4) The distribution within any State of the planning funds made available to agencies under paragraph (3) of this subsection shall be in accordance with a formula developed by each State and approved by the Secretary which shall consider but not necessarily be limited to, population, status of planning, and metropolitan area transportation needs.

(g) Not more than 40 per centum of the amount apportioned in any fiscal year to each State in accordance with sections 144, 152, and 153 of this title, or section 203(d) of the Highway Safety Act of 1973 [23 USCS §130 note], may be transferred from the apportionment under one section to the apportionment under any other of such sections if such a transfer is requested by the State highway department and is approved by the Secretary as being in the public interest. The Secretary may approve the transfer of 100 per centum of the apportionment under one such section to the apportionment under any other of such sections if such transfer is requested by the State Highway department, and is approved by the Secretary as being in the public interest, if he has received satisfactory assurance from such State highway department that the purposes of the program from which such funds are to be transferred have been met. All or any part of the funds apportioned in any fiscal year to a State in accordance with section 203(d) of the Highway Safety Act of 1973 [23 USCS §130 note] from funds authorized in section

203(c) of such Act, may be transferred from that apportionment to the apportionment made under section 219 of this title if such transfer is requested by the State highway department and is approved by the Secretary after has received satisfactory assurances from such department that the purposes of such section 203 [23 USCS §130 note] have been met. Nothing in this subsection authorized the transfer of any amount apportioned from the Highway Trust Fund to any apportionment the funds for which were not from the Highway Trust Fund, and nothing in this subsection authorizes the transfer of any amount apportioned from funds not from the Highway Trust Fund to any apportionment the funds for which were from the Highway Trust Fund.

(As amended Aug. 13, 1973, P. L. 93-87, title I, §§106(b), 111(a), 112, Title II, §227, 87 Stat. 254, 256, 257, 292; May 5, 1976, P. L. 94-280, Title I §§106(b), 107(b), 112(a)-(g), 113(a), Title II, §206, 90 Stat. 429, 420, 433, 435, 453).

23 USC § 118. Availability of sums apportioned

(a) On and after the date that the Secretary has certified to each State highway department the sums apportioned to each Federal-aid system or part thereof pursuant to an authorization under this title, or under prior Acts, such sums shall be available for expenditure under the provisions of this title.

23 USC § 131

(b) Federal-aid highway funds apportioned on or after January 1, 1968 to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than

six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State

(1) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254 [28 USCS § 1254]. If any part

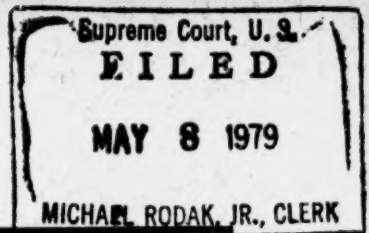
of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so withheld shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

23 C.F.R. §1.36

§1.36 Compliance with Federal laws and regulations.

If the Administrator determines that a State has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State of Federal funds on account of such project, withhold approval of further projects in the State, and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State to the satisfaction of the Administrator.

No. 78-1319



In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF SOUTH DAKOTA, PETITIONER

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS
IN OPPOSITION

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**BRIEF FOR THE RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-27) is reported at 587 F. 2d 915. The opinion of the district court (Pet. App. 11-18) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 1978. The petition for a writ of certiorari was filed on February 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Transportation may withhold 10% of the State's share of federal highway

aid funds pending his final determination under 23 U.S.C. 131(*l*) that the State has failed effectively to control outdoor advertising.

STATEMENT

1. The Highway Beautification Act of 1965, 23 U.S.C. 131 *et seq.*, was enacted to preserve and enhance the safety, recreational value and scenic beauty of the nation's highways. 23 U.S.C. 131(a). The Act establishes limitations on outdoor advertising adjacent to the interstate and federal primary highway systems. If the Secretary of Transportation determines that a state has failed to provide the "effective control" of outdoor advertising required by 23 U.S.C. 131(b), the Secretary may reduce by 10% the state's allocation of federal highway aid funds and redistribute those funds to other states. 23 U.S.C. 131(*l*). The Secretary has discretion, however, to suspend this penalty "[w]hensoever he determines it to be in the public interest * * *." 23 U.S.C. 131(b).

At least 60 days before the Secretary makes a final determination that a state has not complied with the Act, the Secretary must give the state written notice and a statement of reasons for his proposed determination. 23 U.S.C. 131(*l*). The state is then afforded an opportunity for a hearing before the Secretary issues a written order setting forth his final determination. *Ibid.* The state may appeal the Secretary's final order to any federal district court in the state. Once the state has filed a notice of appeal, the Secretary's order is stayed "until final judgment has been entered on such appeal." *Ibid.* If any part of a state's highway aid apportionment is withheld by the Secretary, the amount withheld cannot be reapportioned to other States as long as the appeal is pending. *Ibid.*

2. In the summer of 1976 the Supreme Court of South Dakota invalidated the South Dakota statute that regulated outdoor advertising. *Hogen v. South Dakota State Board of Transportation*, 245 N.W. 2d 493 (S.D. 1976).¹ As a result, the state lacked any effective statutory control over off-premises outdoor advertising, and the Secretary urged the State to pass legislation that would bring the State back into compliance with 23 U.S.C. 131(b). The state legislature considered several corrective legislative proposals, and the Secretary gave his advice about the adequacy of the bills. In April 1977 South Dakota enacted a statute that the Secretary had informed the State would not satisfy federal requirements (Pet. App. 23).

On July 11, 1977, the Secretary formally notified the Governor of South Dakota of his preliminary determination that the State was "not providing for the effective control of outdoor advertising" and that 10% of the State's federal highway aid apportionment for the next fiscal year would be withheld pending a final determination of non-compliance pursuant to 23 U.S.C. 131(*l*) (Pet. App. 23). Beginning October 1, 1977, 10% of the State's federal highway aid apportionment was withheld.

A formal evidentiary hearing was conducted at the State's request, pursuant to 23 U.S.C. 131(*l*). After this hearing, and before the administrative law judge submitted a recommended decision to the Secretary, the State filed this action for injunctive and declaratory relief. The State claimed that the Secretary lacks authority under the Act to withhold 10% of the

¹The court concluded that the state statute unconstitutionally delegated legislative authority to a state officer. 245 N.W. 2d at 496.

State's apportionment prior to a final administrative decision of non-compliance.²

3. The district court denied the State's request for relief, and the court of appeals affirmed (Pet. App. 19-27). The court of appeals held that 28 U.S.C. 315, which authorizes the Secretary to adopt regulations to implement the Act, provides the Secretary ample discretion to adopt reasonable procedures to ensure compliance with the Act, such as the temporary withholding of the 10% penalty pending completion of administrative proceedings pursuant to 23 C.F.R. 1.36 (Pet. App. 24-26). The court concluded that an interim withholding of the penalty was necessary because otherwise "the State could obligate monies to which it may not be entitled because of its noncompliance with the Act, and thereby effectively nullify the penalty provisions contained in section 131(b)" (Pet. App. 25). Moreover, unlike a permanent withholding of funds, the effect on the State is minimal "because the amount temporarily retained still remains available to the State if the Secretary makes a final determination of the 'effective control' question favorable to the State. Therefore, without causing undue prejudice to the State, the Secretary's interim withholding properly preserved the status quo pending the outcome of the hearing" (*id.* at 26).

²At the same time, South Dakota filed an action challenging the constitutionality of the Highway Beautification Act. *South Dakota v. Adams*, Civil No. 77-3039 (D. S.D.). That action is pending.

On November 9, 1978, the Secretary rendered a final determination adverse to the State and permanently withheld that share of the State's apportionment that had been subject to the temporary reservation. In the "public interest," however, the Secretary suspended until March 31, 1979, application of the 10% penalty with regard to later apportionments. South Dakota has appealed from the Secretary's final determination, and that appeal

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

1. The temporary withholding of 10% of the State's share of federal highway aid funds was based on a preliminary determination that the State was not in compliance with the requirements of 23 U.S.C. 131(b). When such a determination is made, the Administrator of the Federal Highway Administration is authorized by regulation to "withhold approval of other projects in the State, and take such further action that he deems appropriate under the circumstances * * *." 23 C.F.R. 1.36. Pursuant to this regulation, a determination was made—and approved by the Secretary—that a portion of the State's share of highway aid funds should temporarily be withheld pending completion of final administrative proceedings under 23 U.S.C. 131(f). The court of appeals correctly concluded (Pet. App. 24-27) that the regulation, and the decision under the regulation to withhold funds pending the final administrative ruling, are authorized by the Act.

23 U.S.C. 315 provides the Secretary broad authority to adopt "all needful rules and regulations for the carrying out of the provisions of [the Act]." Although the statute does not expressly authorize the Secretary to withhold funds temporarily pending completion of administrative proceedings under 23 U.S.C. 131(f), the statute does not preclude such action. In this context,

is pending. *South Dakota v. Adams*, Civil No. 78-3051 (D. S.D.). On March 13, 1979, South Dakota passed legislation that the Secretary has concluded provides for "effective control."

the Secretary reasonably determined that such temporary action is necessary to promote the objectives of the Act by protecting the integrity of the enforcement scheme. See *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 373 (1973). The temporary reservation of funds prevents the State from obligating appropriations that may, on the final determination of non-compliance under 23 U.S.C. 131(l), be permanently withdrawn from the State's allocation. The temporary reservation does not, however, interfere with any of the State's procedural rights under the statute. The Secretary cannot permanently withdraw the funds until a final determination of non-compliance is made after notice and a hearing under 23 U.S.C. 131(l), and the reserved apportionment cannot be reallocated to complying states until judicial review of the final determination is completed. *Ibid.* The purpose of the temporary reservation is thus simply to preserve the status quo and protect the integrity of the enforcement scheme pending exhaustion of administrative and judicial proceedings.

2. Petitioner's reliance (Pet. 9) on *CAB v. Delta Airlines*, 367 U.S. 316 (1961), *United States v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947), and *SEC v. Sloan*, 436 U.S. 103 (1978), is unwarranted.

In *Delta Airlines* the Court held that the CAB could not alter a carrier's certificate without notice and hearing when the applicable statute provided that a certificate may be altered "after notice and hearings," 49 U.S.C. 1371(g). 367 U.S. at 323-334. The Secretary's action in the present case is not, however, inconsistent with any express statutory command. To the contrary, as we have shown above, it is designed to protect the efficacy of the statutory enforcement scheme.

The decision in *Seatrain Lines* is similarly inapposite. The Court held there that the ICC could not modify a water carrier's certificate because the agency had no statutory authority to do so and the legislative history supported the conclusion that such authority had been intentionally withheld by Congress. 329 U.S. at 430. Here, by contrast, the Secretary has been given broad powers to adopt regulations to promote the purposes of the Act, and there is nothing in the legislative history to suggest that the challenged action conflicts with any intended limitation on that authority.

Finally, in *SEC v. Sloan* the Court held that the agency could not pyramid successive 10-day ex parte suspension periods to foreclose indefinitely trading in a security without affording notice and a hearing. The Court noted that the statute limited the duration of summary suspension orders to "a period not exceeding ten days * * *," 15 U.S.C. 78(k), and thus failed to provide a "clear mandate" for the exercise of an "awesome power" to continue summary suspension indefinitely. 436 U.S. at 111-112. In this case, however, the Secretary's temporary action does not threaten any "devastating impact" (*id.* at 112) on the State—on completion of the administrative proceedings after notice and hearing under 23 U.S.C. 131(l), the temporary action ceases to have any effect. The funds will be either restored to the State's allocation or permanently withheld if, as here, a final determination of non-compliance has been made. During the ordinarily brief life of the temporary order,³ the order merely preserves the status quo by preserving the funds that are the subject of the final order.

³The final determination of non-compliance may be made within 60 days from the first notice to the State. Proceedings may

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

MAY 1979

be prolonged in some cases, however, where non-compliance is challenged by the state and substantial evidence is presented at the hearing.